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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

OAKLAND BULK & OVERSIZED TERMINAL, LLC,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

SIERRA CLUB and SAN FRANCISCO BAYKEEPER,

Defendants-Intervenors.

Case No. 3:16-cv-07014-VC

DEFENDANT CITY OF OAKLAND'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT, AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: January 10, 2018
Time: 10:00 a.m.
Ctrm.: No. 2, 17th Floor
Judge: Honorable Vince Chhabria

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LIST OF ABBREVIATIONS

BAAQMD	Bay Area Air Quality Management District
BACT	Best Available Control Technology
BNSF	Burlington Northern and Santa Fe Railway
BoD	Basis of Design
CalEPA	California Environmental Protection Agency
City Br.	Defendant City of Oakland's MSJ and Oppn' to MSJ (Dkt. 145)
CCIG	California Capital & Investment Group, Inc.
DA	Development Agreement
DOT	Department of Transportation
EBMUD	East Bay Municipal Utility District
ENA	Exclusive Negotiating Agreement
ESA	Environmental Science Associates
GHG	Greenhouse gas
HDR	HDR Engineering, Inc.
HMTA	Hazardous Materials Transportation Act
ICCTA	Interstate Commerce Commission Termination Act
LDDA	Lease Disposition and Development Agreement
NAAQS	National Ambient Air Quality Standards
OBOT	Oakland Bulk & Oversized Terminal, LLC
OBOT Br.	Plaintiff OBOT's Motion for Summary Judgment (Dkt. 135)
OGRE	Oakland Global Rail Enterprise, LLC
PHAP	Public Health Advisory Panel
PM	Particulate Matter
Reply	Plaintiff OBOT's Reply ISO MSJ and Opp'n to MSJ (Dkt. 182)
STB	Surface Transportation Board
TLS	Terminal Logistics Solutions
UP	Union Pacific Railroad

I. INTRODUCTION

Defendants are entitled to summary judgment, and OBOT is not, with respect to each of OBOT's claims for relief. (*See* Intervenors' reply brief regarding the Commerce Clause claim.)

II. ARGUMENT

A. The City Complied with the Development Agreement.

1. OBOT Cannot Avoid the Substantial Evidence Standard of the DA.

OBOT ignores the language of DA section 3.4.2 and disregards precedents in which courts review a public agency decision for substantial evidence. OBOT asks the Court to substitute a *de novo* standard of review and to rely on precedents in which, unlike this case, the public agency had not reserved a contractual right to create an exception to a vested right. Reply (Dkt. 182) at 23-27. OBOT's contentions are internally contradictory and wrong.

The relevant provision of the DA states: "Notwithstanding any other provision of this Agreement to the contrary, City shall have the right" to apply post-DA laws if the "*City determines based on substantial evidence* and after a public hearing that a failure to do so would place existing or future occupants or users of the Project, adjacent neighbors, or any portion thereof … in a condition substantially dangerous to their health or safety." Myre Decl, Ex. 4 [DA] § 3.4.2 (emphasis added). It also states that application of a post-DA law is an "exception to Developer's vested rights." *Id.* The City is thus contractually entitled to create an exception to OBOT's vested right if it determines, after a public hearing, that the new law is required to prevent substantially dangerous health and safety conditions. To prove a breach, OBOT must show that the City lacked substantial evidence when it reached its decision. OBOT ignores this contractual language and, instead, discusses standards and cases that conflict with section 3.4.2.

First, OBOT argues that since it did not petition for a writ of mandate under Cal. Code Civ. Proc. § 1094.5, the substantial evidence test does not apply. Reply at 23-24. But the issue is not the label applied to the claim for relief. It is that the DA adopts the substantial evidence test, which section 1094.5 cases regularly apply. *See* City Br. (Dkt. 145) at 11-13. Indeed, the triggers for review under section 1094.5—a hearing was required, evidence was required to be taken, and discretion in determining the facts was vested in the agency—are present in section 3.4.2. *See*

McGill v. Regents of Univ. of Cal., 44 Cal.App.4th 1776, 1785-86 (1996). Thus, writ cases that apply the substantial evidence test under these circumstances are relevant precedents.

As discussed, courts neither reweigh the evidence nor second-guess the agency's selection of which evidence—including expert evidence—to rely upon. As long as *any* substantial evidence in the agency's record supports its decision, the courts affirm. City Br. at 11-13.[1]

Second, OBOT cites inapplicable cases, *e.g.*, *300 DeHaro St. Inv'rs v. Dep't of Hous. & Cmty. Dev.*, 161 Cal.App.4th 1240 (2008). Reply at 24-25. *300 DeHaro* merely holds that a private party may allege a breach of contract claim to challenge an agency's compliance with the parties' regulatory agreement. *Id.* at 1254-56. That decision offers neither a holding nor dictum regarding the standard of review applicable to a breach claim. *See id.* at 1256-58.[2]

Third, OBOT contradicts itself by asking the Court to rely on writ cases of its choosing, *Stewart Enterp., Inc. v. City of Oakland*, 248 Cal.App.4th 410 (2016), and *Davidson v. Cnty. of San Diego*, 49 Cal.App.4th 639 (1996). Reply at 25-27. But unlike *Stewart* and *Davidson*, OBOT agreed to a contract term that expressly provided "an exception to Developer's vested rights," if "the City determines, based on substantial evidence and after a public hearing," that the new legislation is necessary to prevent substantially dangerous health and safety conditions. Myre Decl., Ex. 4 [DA]. It is this contractual exception to vested rights that applies here.

By contrast, *Stewart* involved a City Planning Code section providing, without exception, that after issuance of a building permit, the City could not apply any new law that would prohibit

[1] OBOT also offers distracting, misleading argument about whether the City's adoption of the Resolution was quasi-adjudicatory. Reply at 24. A quasi-adjudicatory action is at issue where a city applies law to a factual scenario—*e.g.*, to a party or development—irrespective of the formality or adversarial characteristics of the administrative proceeding. For example, a city's decision to approve a conditional use permit, subdivision map, or variance is "adjudicatory in nature" because the agency applied law to a factual scenario. *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 518, 522-23 (1980); *Pacifica Corp. v. City of Camarillo*, 149 Cal.App.3d 168, 176 (1983). Such quasi-adjudicatory decisions are commonly "accomplished by resolution rather than by ordinance." *Essick v. City of Los Angeles*, 34 Cal.2d 614, 623 (1950).

Here, the City Council took (1) legislative action to adopt the Ordinance and (2) quasi-adjudicatory action to apply it to OBOT, as reflected in its adoption of the Resolution. Such quasi-adjudicatory actions, regularly memorialized in resolutions, are commonly reviewed under Cal. Code Civ. Proc. § 1094.5, in which the deferential substantial evidence test applies. *See, e.g., McGill,* 44 Cal.App.4th at 1785-86 (1996).

[2] In addition, in *300 DeHaro,* neither the contract nor the law required a public hearing. *Id.* at 1248 & 1252. By contrast, the DA *required* the City to conduct a public hearing, which it did.

the project. *Stewart*, 248 Cal.App.4th at 414. Even though the plaintiff had an unqualified vested right to rely on the building permit, *id.* at 418-20, the City retained *inherent* police power authority to abrogate that vested right based on common law standards and independent judicial review as to the sufficiency of the evidence. *Id.* at 420-21.[3] *Davidson* similarly concluded that a county has "inherent sovereign power … to interfere with vested property rights whenever reasonably necessary" to protect public health. *Davidson*, 49 Cal.App.4th at 648-49.

Here, the City applied the Ordinance to OBOT based on its express contractual authority to apply post-DA legislation, as an exception to OBOT's vested right, pursuant to the contract standard. Unlike *Stewart* and *Davidson*, the City did not rely on its inherent police powers.[4]

Fourth, OBOT contends that the scope of evidence relied upon here is similar to that in *Stewart*. Reply at 26-28. OBOT is incorrect. In *Stewart*, the City cited general statements of concern regarding health and economic impacts to justify the abrogation of Stewart's vested right, pursuant to the City's inherent authority. *Stewart*, 248 Cal.App.4th at 414, 423-24. Independent judgment review applied (not the substantial evidence test contractually applicable here), and the general concerns did not satisfy the heightened standard. *Id.* at 424.

Here, extensive, data-supported evidence in the record before the Council supported its finding that application of the Ordinance was necessary to prevent substantially dangerous health and safety conditions. *See* City Br. at 14-20, and pp. 4-9, below. Whereas *Stewart* involved generalized fears regarding a permitted crematorium, here, the Council considered extensive

[3] A public agency's inherent authority to abrogate a vested right derives from the common law rule that "[a] governmental entity may not, through contract or legislation, abdicate its police power." *Davidson*, 49 Cal.App.4th at 648. The courts developed standards for reviewing an agency's exercise of its inherent authority, *id.* at 648-49, which do not apply in this contract case.

[4] OBOT also contends that it has free rein to offer new evidence to contradict the evidence considered by the Council. Reply at 25 n.24. The assertion is unsupported and would improperly put the City in the role of defending the Council's decision based on evidence that was not before it. Furthermore, OBOT cites inapplicable cases. *Bright Dev. v. City of Tracy* concerned review of a decision under Cal. Code Civ. Proc. § 1085, for which a hearing was not required by law. The outcome "turn[ed] not on whether the agency's findings [we]re supported by substantial evidence," but on whether the decision was arbitrary and capricious. 20 Cal.App.4th 783, 795 (1993). Thus, the rules regarding judicial review of quasi-judicial decisions made after a required public hearing did not apply. *Id.*; *see also Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, 191 Cal.App.4th 435 (2010) (breach claim was not based upon a decision made by council following a public hearing and consideration of evidence); *Border Bus. Park, Inc. v. City of San Diego*, 142 Cal.App.4th 1538, 1544-46, 1561 (2006) (same).

evidence regarding a proposed Terminal that would store and handle over five million tons of dust-generating, spontaneously-combustible coal and coke in close proximity to residents, commuters, and park and recreational path users. OBOT's attempt to rely on *Stewart* fails.[5]

2. Substantial Evidence Supports the Application of the Ordinance to OBOT.

a. The City Has Disputed OBOT's "Evidence."

OBOT devotes large portions of its reply to contentions that the City does not dispute facts or respond to OBOT's arguments about alleged (non)danger posed by the Terminal. Reply at 28-35, 38-40. Nonsense. The City has addressed, point-by-point, OBOT's mistaken assertion that third party regulators will *guarantee* that the Terminal will not pose a substantial danger to the community. City Br. at 20-23. As the City has explained and highlights below, OBOT's blind faith in existing health and safety regulations is readily disproven by real-world facts in the record that OBOT either does not dispute or cannot dispute credibly.[6]

b. The Storage and Handling of Coal and Coke Will Create Substantially Dangerous Air Quality Conditions.

Substantial, undisputed evidence in the City's decision-making record establishes that storing and handling coal and coke at the Terminal will create substantially dangerous air quality conditions. City Br. at 14-19, 20-22. Rather than counter the evidence, OBOT offers superficial citations to Clean Air Act statutory and regulatory provisions and leaps to the conclusion that harmful air quality conditions simply cannot arise under BAAQMD's watch. Reply at 30-32. But undisputed facts disprove OBOT's position, including as follows:

- Despite decades of BAAQMD oversight, Bay Area air quality still is not designated as "attaining" all health-based state and federal air quality standards. Myre Decl., Ex. 45 [ESA] at OAK230350.

[5] The *Stewart* crematorium had a BAAQMD permit. *Stewart*, 248 Cal.App.4th at 413-14. OBOT suggests that BAAQMD has similarly approved the proposed Terminal. Reply at 26. Not so. BAAQMD was "neutral" on the Ordinance, which it described as a "land use decision for the City of Oakland." Myre Decl., Ex. 29 at OB13677-78. Indeed, OBOT has not even applied for a BAAQMD permit. Supp. Long Decl., Ex. 71 [Tagami Tr.], pp. 532:22-533:22; 536:21-25.

[6] Moreover, OBOT seeks to reverse the burden of proof. It must show that no substantial evidence in the entire record supported the City's decision. *See, e.g., Do v. Regents of the Univ. of Cal.*, 216 Cal.App.4th 1474, 1492 (2013); City Br. at 11-13. OBOT's bald assertions about how existing regulations will or should work in the abstract do not meet this heavy burden.

- West Oakland is more heavily polluted than other Bay Area communities. Air quality standards are exceeded more regularly, and residents suffer disproportionate health impacts, *e.g.*, elevated rates of asthma. Long Decl., Ex. 17 [PHAP] at OAK8449-60; Ex. 10 [Chafe] at OAK120965-70; Myre Decl., Ex. 45 [ESA] at OAK230300-01.

- Unlike the South Coast Air Quality Management District, BAAQMD lacks specific regulations to reduce air pollution from coal terminals. Myre Decl., Ex. 28 at OAK242423; Long Decl., Ex. 56 at OAK4956.

- BAAQMD staff testified that emissions from the only other coal terminal in the Bay Area, located in Richmond, contribute to higher pollution levels and adverse health impacts. Myre Decl., Ex. 29 at OB13681; Long Decl., Ex. 56 at OAK4956.[7]

- ESA accounted for BAAQMD regulations and presumed that BAAQMD would require OBOT to install Best Available Control Technology ("BACT"). Myre Decl., Ex. 45 [ESA] at OAK230300-01.

- Even with BACT, ESA calculated that Terminal operations would still emit 14.8 pounds per day of fine particulate matter pollution ($PM_{2.5}$), with an additional 67 pounds per day expected from the staging of rail cars at or near the facility. *Id*. at OAK230372-73, 230376.[8] These emissions "would exacerbate already poor air quality and would likely add to the existing number of exceedances" of the National Ambient Air Quality Standards ("NAAQS") for $PM_{2.5}$. *Id*. at OAK230374.[9]

- EPA concluded there is "no population threshold, below which it can be concluded … that $PM_{2.5}$-related effects do not occur." 78 Fed. Reg. 3018, 3098 (Jan. 15, 2013). Other entities like CalEPA concluded likewise. City Br. at 15-16. OBOT does not dispute these findings; rather, it bickers with the City's statement that there is "no safe level" of $PM_{2.5}$, Reply at 31—though this is just a less-technical but still apt summary of the undisputed scientific consensus.

- EPA repeatedly cautions that while the $PM_{2.5}$ NAAQS was formulated with the aim of protecting public health, including sensitive groups, the standard does not represent a "bright line" for health protection. 78 Fed. Reg. at 3140, 3141, 3158.[10]

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[7] OBOT misstates BAAQMD testimony to the Council. Reply at 30. BAAQMD staff explained that Richmond is one of BAAQMD's "[CARE] impacted communities" (a community requiring special regulatory attention "based on air pollution impacts and adverse health outcomes"). Myre Decl., Ex. 29 at OB13678, 81. In written comments, he described "communities surrounding the Port of Richmond" as "exposed to relatively high levels of air pollution due to multiple sources of air pollution in close proximity." Long Decl., Ex. 56 at OAK4956. BAAQMD staff also stated that "[t]here is a lot of work to be done to continue … to reduce exposure of the public to pollution in West Oakland." Myre Decl., Ex. 29 at OB013677-78.

[8] ESA's calculations assumed BACT would function without deficiency. In the real world, accidents, upsets and violations of permit conditions are not uncommon. *See* City Br. at 22.

[9] OBOT's post-hoc expert testimony admits that exceedances of the $PM_{2.5}$ NAAQS standard *already* occur in West Oakland, and also that Terminal operations will increase concentrations of this harmful pollutant in surrounding residential areas. *See* Supp. Chinkin Decl., Ex. G at p. 67, Figure 15 (exceedances), p. 77, Table 11 (increased concentrations), pp. 83-84 (same).

[10] OBOT ignores EPA's finding about this shortcoming in the standard, presumably because it disproves its argument that there can be no harm unless a NAAQS violation is proven. Reply at 31-32. OBOT also distorts the testimony of the City's expert Dr. Nadia Moore, Reply at 31-32,

- At least three courts have ruled that $PM_{2.5}$ is harmful at levels below NAAQS. City Br. at 16. OBOT expert Lyle Chinkin testified in two of the cases for the United States, which was seeking to enforce the Clean Air Act against polluters who—like OBOT—claimed that impacts below the level of the NAAQS were inconsequential.[11]

- In addition to the dangers posed by $PM_{2.5}$, fugitive dust from coal poses a separate, additional harm because it contains toxic heavy metals and minerals. City Br. at 16. OBOT does not dispute this substantial danger from coal and coke that is not posed by other commodities that the Terminal might handle.

Unable to dispute the evidence supporting the Council's finding, OBOT contends that deposition testimony of Claudia Cappio negates the extensive body of evidence before the Council.[12] Reply at 28-29, 31, 39. This tactic fails. As stated in the City's objections to the Rule 30(b)(6) deposition, the issue is whether substantial evidence supported the Council's decision at that time, not after-the-fact reflections and legal interpretations of a non-lawyer staff member. Long Decl., Ex. 49, pp. 10-11; *see also* Objections to Evidence and Reply filed herewith.

In any event, OBOT's "gotcha" citations to deposition quotations do not undermine the substantial evidence presented to the Council. Ms. Cappio, an urban planner by training and vocation, never claimed expertise regarding environmental issues such as air quality standards and BAAQMD regulations. Moreover, she testified that she never determined the effectiveness of BAAQMD's regulations and understood that exceedances of their thresholds occurred. Supp. Long Decl., Ex. 73 [Cappio Tr.], pp. 174:25-175:10, 176:6-15, 177:21-178:3, 178:23-180:3, 180:18-23, 279:14-280:3, 343-344, 383:4-25. Ms. Cappio thus supported the hiring of ESA and the collection of evidence by other qualified professionals so that staff could provide a record upon which the Council could make a decision based on substantial evidence. *Id.*, pp. 185-86, 211-13, 273-74, 425-32; Cappio. Decl., ¶¶ 3-6.

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who merely acknowledges that OBOT "correctly references relevant statutory provisions *but does not address the dynamic nature and historical evolution of the NAAQS*." Moore Decl., ¶ 10 (emphasis added). As Dr. Moore explained—in testimony OBOT does not refute— "NAAQS are established as policy decisions" "and should not be regarded as a 'bright line' (or threshold) between an effect and a no effect level." Moore Decl., ¶¶ 9-15.

[11] Supp. Long Decl., Ex. 75 [Chinkin Tr.], pp. 22-27; Supp. Chinkin Decl., Exh. G, p. D-1; *see generally United States v. Westvaco Corp.*, No. CV MJG-00-2602, 2015 WL 10323214 (D. Md. Feb. 26, 2015); *United States v. Cinergy Corp.*, 618 F.Supp.2d 942, 963 (S.D. Ind. 2009) *rev'd on other grounds*, 623 F.3d 455 (7th Cir. 2010).

[12] Ms. Cappio and Mr. Cashman testified in response to depositions notices directed to them as individuals, not solely as 30(b)(6) witnesses. *See* Supp. Long Decl., Exs. 78, 79.

Finally, OBOT offers "red herring" arguments that in no way undermine the substantial evidence in the record. For example, OBOT claims the City should have analyzed operations at other terminals. Reply at 30. But ESA did. Myre Decl., Ex. 45 at OAK230329-31, 230449, 230451. And other evidence supports the conclusion that coal storage and handling at the nearby terminal in Richmond harms public health, as discussed above. OBOT further asserts that if the City was committed to reducing $PM_{2.5}$ pollution, it would have analyzed potential emissions from other commodities and foregone the exemption for a local foundry that may use up to 17,000 tons of coke per year. Reply at 29, 31, 38. But OBOT ignores the unique dangers posed by the heavy metals and silica in fugitive coal dust, and OBOT admits that the foundry only handles a tiny fraction of the five *million* tons of coal that OBOT has proposed to handle at the terminal each year. Reply at 29 Myre Decl., Ex. 45 [ESA] at OAK230315 (citing OBOT's Basis of Design).

OBOT also extracts snippets of deposition testimony to suggest that the ESA Report was politically directed and doubted by ESA staff. OBOT fabricates its smear campaign by taking testimony out of context. *See, e.g.,* Supp. Long Decl., Ex. 77 [Brown Tr.], pp. 120-21 (ESA was "objective … there was no direction to craft an answer"). At the same time, OBOT ignores the fact that some of the analytic challenges encountered by ESA stemmed from OBOT's inability or refusal to supply more than conceptual plans for the Terminal. *See, e.g.,* Cappio Decl., Exs. 1, 2; Sahu Decl., ¶ 13; Myre Decl., Ex. 45 at OAK 230312-13. And while OBOT quibbles with a handful of details from the ESA Report, its complaints neither undermine the evidence in ESA Report nor any of the other, numerous sources of information submitted to the City—including the reports of the Public Health Advisory Panel ("PHAP") and Dr. Zoe Chafe.[13]

c. The Record Contains Substantial Evidence of Fire and Explosion Risk.

OBOT attempts—without success—to overcome the evidence of risks of fires and explosions. Reply at 33-34. The Council based its decision on substantial evidence that coal is at

[13] OBOT does not mention or refute the findings of the PHAP. As for the Chafe Report, OBOT offers only innuendo, suggesting without evidence that Councilmember Kalb directed Dr. Chafe to reach a particular conclusion. Reply at 39 n.37. But Dr. Chafe confirmed that her task was to independently evaluate the issues (not to reach a conclusion), and that she did just that. Supp. Long Decl., Ex. 74 [Chafe Tr.], pp. 59:10-21, 66:1-22, 75:5-17, 78:4-8.

high risk of spontaneous combustion and explosion, despite safety protocols, that emit toxic smoke that endangers health and causes injuries and death. City Br. at 19-20. OBOT does not contest this substantial evidence. Instead, it refers to labels attached to coal shipments that would help first responders evaluate risks, *e.g.*, in the event of a collision with a tanker carrying a particular commodity. Reply at 33 (citing Myre Decl., Ex. 27 [Cappio Tr.] at 163-64). Similarly, OBOT asserts that the 13 reported fire events is not sufficiently high or relevant. Reply at 33.

OBOT misses the point. The issue is whether the City based its decision on substantial evidence. Here, substantial evidence supports the City's finding regarding the risk of fire and explosion at the Terminal, to which OBOT proposes to bring five million tons of coal each year, and which lies adjacent to the Bay Bridge Toll Plaza, a recreational path, and residences and parks in the disproportionately impacted West Oakland community. The City may legislate for a low-risk/high impact scenario; it need not assume the best-case scenario. And the existence of evidence upon which the City could have made a contrary conclusion—evidence that OBOT declined to produce when the City adopted its ordinance—is irrelevant.[14]

d. OBOT Is Wrong About Worker Safety and Climate Change.

The substantial evidence regarding fugitive coal dust and combustion, discussed above and in the City's moving papers, demonstrates that OSHA cannot prevent all substantially dangerous conditions. Workers who store and handle coal and petcoke will need to blend (mix) different coals in enclosed facilities. Such activities will expose them to well-documented health risks such as emphysema and pneumoconiosis. Long Decl., Ex. 10 [Chafe], at OAK 120954-55.

While climate change is a global phenomenon, it has local impacts, including health impacts associated with increasingly hot weather and harm from increased fires and flooding. Long Decl., Ex. 10 [Chafe] at OAK12100-11; Long Decl., Ex. 17 [PHAP] at OAK8513-8529. OBOT offers post-decision evidence to contend that the Terminal's contribution to global

[14] OBOT also asserts that there could not be substantial evidence of combustion impacts because the City chose not to shut down manufacturers who use coke. Reply at 34. But the extent of potential risks at a manufacturing site sheds no light on risks at the Terminal. Moreover, regulators "do not generally resolve massive problems in one fell regulatory swoop … but instead whittle away over time." *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007).

warming would be too small to constitute an impact. But OBOT deprived the Council of its opportunity to consider that evidence, so the Court should disregard it. Also, given the gravity of the harms associated with climate change, the City is well within its authority to seek incremental progress. *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Govs.*, 3 Cal.5th 497, 515 (2017).

3. The Council Properly Took Action After the Public Hearing.

OBOT reframes its "predetermination" allegations as a failure to act following a public hearing. Reply at 36-37. Under any framing, OBOT's argument fails.

OBOT does not dispute that the City held public hearings prior to voting to adopt the Ordinance and Resolution. *See* OBOT Br. (Dkt. 135) at 5; Myre Decl., Exh. 28 [6/27/17 Agenda Report] at OAK242419, 40 (discussing of public hearing notices); Supp. Long Decl., Ex. 80 [6/27/16 public hearing transcript]. Instead, OBOT implies that the Court should disregard the public hearings, based only on OBOT's *perception* that the Council did not wait until after the June 27, 2016 public hearing to make its final decision.[15] The contention is baseless.

City councilmembers—who serve multiple roles, *e.g.*, as legislators and decision makers on quasi-adjudicatory matters involving development rights—can have predispositions and make pronouncements regarding matters of public interest without affecting the validity of their subsequent votes after completion of the process. *City of Fairfield v. Superior Court*, 14 Cal.3d 768, 774 n.5, 776-80 (1975) (timing of councilmember decision to deny land use project and reasons therefor were irrelevant); *Breakzone Billiards v. City of Torrance*, 81 Cal.App.4th 1205, 1208-09, 1240-41 (2000) (councilmember who appealed planning commission's issuance of use permit properly participated in public hearing on appeal to council). The issue is whether the City's ultimate decision was reasonable, not councilmembers' subjective decision-making processes. *Kutzke v. City of San Diego*, 11 Cal.App.5th 1034, 1042 (2017) (court must uphold decision unless "no reasonable municipality could have reached the same decision as the City");

[15] While the Council President set aside time at the June 27 public hearing to hear from OBOT, OBOT did not appear. Instead, OBOT sent a third party to threaten a lawsuit. Supp. Long Decl., Ex. 80 [6/27/16 Tr.], pp. 29, 42-43. Given that OBOT did not see fit to offer the Council evidentiary or legal grounds to reject the proposed Ordinance and Resolution, its complaints about the Council's consideration of the evidence are clearly not made in good faith.

Breneric Assocs v. City of Del Mar, 69 Cal.App.4th 166, 184-86 (1998) (courts consider whether the record justified city's agency's action, not councilmembers' motivations).[16]

For example, in *City of Santa Cruz v. Superior Court,* 40 Cal.App.4th 1146 (1995), a developer challenged the city's adoption of a general plan following the requisite public hearing.[17] The developer claimed that the city had decided, prior to the public hearing, to reserve certain properties for agricultural use only. The Court held that these contentions were irrelevant, and the developer was not allowed to discover or proffer evidence related thereto. The issue was the legality of the decision based on the record before the council, not councilmembers' pre-hearing intentions. *Id.* at 155-57; *see also Bd. of Supervisors v. Superior Court,* 32 Cal.App.4th 1616, 1627 (1995) ("the attempt to determine when a supervisor decided to vote a particular way is bound up in why that decision was reached; once again, the inquiry goes to the thought processes, which are prohibited"). Similarly here, OBOT's attempt to cast aspersions on the public process are not based on illegal action; instead, OBOT improperly seeks to use "evidence" of public officials' intent and motivations in a misdirected challenge to the City's substantive decision. *City of Santa Cruz*, 40 Cal.App.4th 1146, 1156. The purported evidence is irrelevant.

In any event, OBOT's "evidence" does not support its contentions. For example, the June 2014 Resolution merely expressed a general policy regarding the transportation of fossil fuels and directed staff to explore measures to address the impacts thereof. Myre Decl., Ex. 62. As to Ms. Cappio, she testified that she had conversations with two councilmembers who were interested in preventing OBOT from developing the Terminal for coal, not that they had decided how they would vote irrespective of the evidence in the yet-to-be-completed record and presentation of proposed legislation. See Myre Decl., Ex. 27 at 261. And assertions that ESA's work could have

[16] OBOT asserts that the prohibition against judicial inquiry into councilmembers' motives was rejected, with respect to breach of contract claims, in *Guntert v. City of Stockton*, 43 Cal.App.3d 203, 217 (1974). Reply at 36 n.33, OBOT misstates the case. In *Guntert*, the Court held that the city lacked an objective, reasonable basis for terminating a lease, and it did not inquire into the subjective reasons therefor. 43 Cal.App.3d at 209, 217.

[17] Cities commonly hold public hearings prior to adopting a general plan, development agreement, zoning ordinance, use permit or variance. *See, e.g.,* Cal. Gov. Code §§ 65355, 65867, 65854, 65905. The public hearings are investigative and evaluative, not adversarial, and do not bear the hallmarks of court proceedings. *See, e.g., Breakzone Billiards*, 81 Cal.App.4th at 1236-37; *cf. Today's Fresh Start, Inc. v. Los Angeles Cty. Office of Educ.,* 57 Cal.4th 197, 220, (2013).

been even more robust or published sooner shed no light on whether the work ultimately presented includes substantial evidence to support the action taken following the public hearing.

Even if the Court were to apply *de novo* review or independent judgment, the weight of the record evidence, as well as the extra-record evidence, tips in the City's favor.

B. ICCTA Does Not Preempt Application of the Ordinance to OBOT.

ICCTA is irrelevant because the Ordinance does not regulate transportation *by* a rail carrier; it regulates owners and operators of "Bulk Material Facilities," and activities that take place ***at*** such facilities (a geographical limitation). OBOT attempts to invoke ICCTA by (1) conflating activities of OGRE, Class I rail carriers (UP and BNSF), and TLS, (2) arguing the Ordinance regulates activities and entities that it expressly does not; and (3) citing inadmissible lay testimony by the City's 30(b)(6) witness regarding the interpretation of the Ordinance. But these arguments ignore the Ordinance's plain language and the express limitations (geographic, and entity) set forth therein. Undeterred, OBOT contends the Ordinance is preempted because it will impact rail carriers. But courts and the STB have consistently rejected this argument.

Moreover, OBOT is the sole plaintiff; TLS, BNSF, UP and OGRE are *not* parties. OBOT's briefing reveals that the sole basis of its ICCTA claim is unsubstantiated injuries to non-parties. OBOT "cannot rest [its] claim to relief on the legal rights or interests of third parties," *Warth v. Seldin*, 422 U.S. 490, 499 (1975), nor demonstrate standing based on alleged injury to a separate entity, OGRE, that has the same parent, CCIG. *Secs. Indus. & Fin. Mkts. Ass'n v. U.S. Commodity Futures Trading Comm'n*, 67 F.Supp.3d 373, 407-08 (D.D.C. 2014) (subsidiary cannot sue on behalf of parent or "members of its extended corporate family") (collecting cases nationwide). Particularly where the allegedly injured third parties (*e.g.*, UP and BNSF) have not intervened, submitted declarations, or otherwise participated in a suit that purportedly protects their interests.

As explained below, OBOT has failed to prove that OGRE is a rail carrier, that the Ordinance regulates transportation *by* rail carriers; or that the Ordinance regulates rail transportation. But even if the Court were to determine that part of the Ordinance is preempted, the preempted provision should be severed and the remainder upheld.

1. OBOT Has Failed to Carry Its Burden of Producing Admissible Evidence that OGRE Is a Rail Carrier.

The City's Motion argued that the Ordinance does not implicate ICCTA because TLS, OBOT, and OGRE are not rail carriers, and OBOT had not produced any admissible evidence that OGRE would operate "under the auspices of" a rail carrier. City Br. at 26-29. OBOT concedes that neither TLS nor OBOT is a rail carrier, Reply at 16-17, but argues that OGRE is a rail carrier because (1) OGRE provides common carrier services for compensation, and (2) its activities will be an integral part of UP or BNSF's services. Reply at 16, 17 n.13. However, no admissible evidence supports either argument.

First, it is undisputed that OGRE is not an STB-licensed rail carrier.[18] Reply at 17 n.13.

Second, OBOT has not submitted evidence that OGRE is holding out its "last mile" services to the public, or will do so. In fact, OGRE's 30(b)(6) witness testified that OGRE will only provide last mile services to UP and BNSF. Supp. Long Decl., Exh. 72 [McClure II Tr.], at 68-69:22-3, 210:11-14.

Third, OBOT failed to cite competent evidence establishing that OGRE's last mile services are "integral" to any rail carrier's services, or that OGRE's services will be performed "under the auspices of" a rail carrier. Reply at 17. OGRE's 30(b)(6) witness cannot establish that OGRE services are "integral" to and will be performed "under the auspices of" third parties UP and BNSF. Only UP and BNSF can establish these facts, yet they failed to challenge the Ordinance, intervene in this lawsuit, or submit a declaration in support of OBOT's motion. If OGRE's services were critical to UP and BNSF, they, not OBOT, TLS (a terminal operator), and Bowie (coal producer) would have financed and/or initiated this lawsuit.[19]

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[18] This fact distinguishes *Fayard v. Ne. Vehicles Servs.*, 533 F.3d 42 (1st Cir. 2008). There, the First Circuit summarily rejected plaintiff's argument, made for the first time on appeal, that the short line carrier was not a "rail carrier," because the STB had already determined that the short line carrier was a rail carrier. *Id.* at 45-47 and n.4. OBOT's suggestion that the timing of appellant's argument was "immaterial" is wrong. Because the rail carrier argument was not made until appeal, the short line carrier did not have to present evidence that it was a common carrier (*i.e.*, that it held its services out to the public) to the district court.

[19] Evidence that OGRE provides switching services for UP and BNSF in the Port of Oakland railyard (and thus, performs switching services "under their auspices") is not evidence that OGRE will provide last mile services under the auspices of UP or BNSF on the new track connecting the

2. The Ordinance Does Not Regulate Transportation by Rail Carriers.

The Ordinance prohibits the Owner or Operator of any Coal or Coke Bulk Material Facility, or any person that stores or handles coal ***at*** such facility, from loading, unloading, transloading, or transferring coal ***at*** a Coal Bulk Material Facility. Myre Decl., Ex. 1, § 8.60.040. ICCTA is irrelevant because the Ordinance regulates owners and operators of "Bulk Material Facilities," and activities that take place ***at*** such facilities (a geographical limit), not transportation by rail carriers. OBOT's counterarguments can be swiftly dismissed.

First, OBOT argues that the Ordinance regulates "any and all 'rail carriers' who handle coal or petcoke," prohibits rail operations necessary to move coal from the West Gateway to the Terminal, and regulates "transportation by rail carrier" because it prohibits "a UP, BNSF, or OGRE locomotive" from unloading coal into TLS's dump pits. Reply at 16. Again, OBOT relies on Ms. Cappio's irrelevant and inadmissible 30(b)(6) testimony and ignores the Ordinance's plain language. *See* Reply at 16 n.12; City Br. at 12, 23-24. In fact, the Ordinance (1) only regulates the loading, unloading, transloading, or transfer of coal and coke "***at*** a Coal or Coke Bulk Material Facility" (a geographic limitation); and (2) expressly does not regulate the transportation of coal or coke "to or from a Coal or Coke Bulk Material Facility." Myre Decl., Ex. 1, at §§ 8.60.010; 8.60.040(A) & (B). Because the Ordinance expressly does not regulate transportation to or from a Coal or Coke Bulk Material Facility, the Ordinance does not regulate the transportation of coal or coke through Oakland on the main line, in the Port of Oakland rail yard, or on the segment of track that will connect the Port of Oakland rail yard to the Terminal.[20] Even if the Ordinance could be read to regulate a rail carrier's unloading of coal or coke at a Bulk Material Facility, this Court must narrowly construe the Ordinance to uphold its constitutionality

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railyard to the Terminal. Reply at 18. A "'common carrier may in some circumstances operate as a private carrier.'" *N.Y. Susquehanna & W. Ry. Corp. v. Jackson*, 500 F.3d 238, 251 (3d Cir. 2007) (citation omitted). Thus, even if OGRE is a common carrier for switching purposes (which OBOT has not established), it could be a private carrier for purposes of last mile services. Yet OBOT failed to submit any evidence in support of its assertion that OGRE (a third party that is not party to this lawsuit) will offer its last mile services to the public.

[20] OBOT's characterization of the City's argument as assuming that "'transportation' includes only an uninterrupted trip 'across the tracks' in which the train never stops, unloads or transfers cargo to a ship for export" fails for the same reason. Reply at 17.

and avoid preemption. *S.D. Myers, Inc. v. City & Cty. of San Francisco*, 253 F.3d 461, 468 (9th Cir. 2001); *Fla. East Coast Ry. v. City of W. Palm Beach*, 266 F.3d 1324, 1328 (11th Cir. 2001).

Second, OBOT argues that by prohibiting storage and handling of coal and coke at a Bulk Material Facility, the Ordinance regulates "conduct that, by definition, regulates 'transportation by rail carrier.'"[21] Reply at 18. But courts and the STB have repeatedly rejected OBOT's argument that a statute regulates "transportation by rail carrier" by regulating entities that use, or want to use, rail carrier services.[22] In *Sea-3*, the STB held that ICCTA did not preempt local agency land use review of an application to expand a propane distribution facility simply because a rail carrier served that facility. *Sea-3, Inc. – Petition for Declaratory Order*, FD No. 35853 2015 WL 1215490 at *1, 5, (STB Mar. 16, 2015). The STB rejected Sea-3's argument that Portsmouth's challenge to the expansion of Sea-3's distribution facility was preempted because the effect of Portsmouth's challenge on rail carriers (fewer rail-based propane shipments) did not "reflect undue interference with transportation by rail carriers." *Id.* at *5. Applying the same logic, the Ordinance's effect (fewer rail-based coal shipments than without the Ordinance) does not mean that it regulates "transportation by rail carrier."[23] *See also N.Y. & Atl. Ry. Co. v. Surface Transp. Bd.*, 635 F.3d 66, 72-73 (2d Cir. 2011); *Hi Tech Trans, LLC v. New Jersey*, 382

[21] Contrary to OBOT's interpretation, *Valero* is instructive. The STB declared that although the facility would be served directly by Union Pacific, Valero, a non-carrier, would not be acting as an agent for the rail carrier in constructing and operating the facility; further, Valero failed to show that the decision denying the project would interfere with UP's existing operations. *Valero Refining Co.*, FD. No. 36036, 2016 WL 5904757, at *3 (STB Sept. 20, 2016).

[22] OBOT does not meaningfully distinguish its situation from the City's Amazon analogy—describing an Amazon warehouse that receives a product by rail, repackages or reconfigures that product, and subsequently ships that product off to retailers or other customers via truck or ship. City Br. at 30, Reply at 19 n.18. Such a facility would not be preempted from local health and safety laws in its handling simply because those products were delivered by rail. Instead, OBOT simply argues that the transportation by rail does not end until the commodity reaches its final destination, and that any law related to that product regulates rail carriage in violation of ICCTA. This reasoning has been squarely rejected. *CFNR Operating Co.*, 282 F.Supp.2d at 1118-19.

[23] No evidence supports OBOT's suggestion that OGRE or a Class I carrier might do the "handling necessary to transfer the coal and petcoke from the rail cars onto ships." Reply at 18. TLS—not OGRE, UP, or BNSF—will manage the dumping of coal, transport coal from dump pits, store it, blend it, and load it onto ships. Long Decl., Ex. 39 [Bridges Tr.] at 63:11-16, 68:11-19; 74:11-75:7, 76:1-77:2, 93:10-96:10; Supp. Long Decl., Ex 82, at OB082060–65; *see also* Long. Decl. Ex. 7 at OAK0004717 (Basis of Design); OB083235-45 (E-mail from HDR to OBOT). And because TLS is not a rail carrier, the Ordinance's regulation of these activities is not preempted by ICCTA.

F.3d 295, 308 (3d Cir. 2004); *CFNR Operating Co. v. City of Am. Canyon*, 282 F.Supp.2d 1114, 1118 (N.D. Cal. 2003); *Valero,* 2016 WL 5904757.

Finally, OBOT's argument that ICCTA preempts the Ordinance's regulation of TLS's activities at its Terminal should be rejected. ICCTA only applies to the regulation of transloading facilities (*i.e.*, the Terminal) if the facility is an integral part of a rail carrier's operations. *N.Y. & Atl. Ry. Co.,* 635 F.3d at 71. That determination depends on (1) whether a rail carrier owns the transloading facility, has paid for the construction and operation of the facility and holds out transloading as part of its service, (2) whether the third party transloader is compensated by the carrier or shipper, (3) the degree of control retained by the carrier over the third party, and (4) other terms of the contract. *Borough of Riverdale Petition for Declaratory Order*, FD No. 352992010 WL 3053100, at *4 (STB Aug. 5, 2010); *see also* 49 U.S.C. § 10501. Here, it is undisputed that TLS (which is undisputedly not a rail carrier) would (1) construct, own, operate, and hold out the transloading services that will take place at its Bulk Material Facility as part of its own services (not the services of OGRE or a Class I carrier); (2) be compensated by shippers, not rail carriers, and (3) not be controlled by a rail carrier. Supp. Long Decl., Ex. 72 [McClure II Tr.], at 67:18-21, 188:7-13; Ex. 39 [Bridges Tr.] at 63:11-16, 74:11-75:7, 93:10-96:10. Thus, ICCTA does not apply to the Ordinance's regulation of the Terminal operations.[24]

3. The Ordinance Is Not Preempted by ICCTA.

OBOT failed to rebut the City's argument that the Ordinance does not constitute "regulation of rail transportation" within the meaning of that section. 49 U.S.C. §10501(b).

As discussed, the Ordinance regulates the storage and handling of coal and coke at Bulk Material Facilities, not the transportation of coal "to or from" such facilities. Undeterred, OBOT argues that the Ordinance is preempted because it "stops UP, BNSF, and OGRE from carrying

[24] In passing, OBOT argues that ICCTA preempts the Ordinance because it regulates transportation "by railroad and water, when the transportation is under common control, management, or arrangement for continuous carriage or shipment." Reply at 17, quoting 49 U.S.C. § 10501(a). This argument, which is unsupported by legal or fact citation, fails because OBOT submitted no evidence that the contemplated international transportation of coal or coke by railroad and water will be under common control, management or arrangement. *Long Beach Banana Distrib., Inc. v. Atchison, T. & S. F. Ry. Co.*, 407 F.2d 1173, 1178 (9th Cir. 1969). "Mere practical continuity in the transportation is not enough." *Id.*

coal and petcoke for export through the Terminal." Reply at 20. But it is undisputed that UP, BNSF, and OGRE will not transport coal from TLS's dump pits to ships for export. Supp. Long Decl., Ex. 72 [McClure II Tr.], at 218:12-16. At most, OGRE will transport coal from the Port of Oakland rail yard to TLS's dump pits at TLS's direction. *Id.* From there, TLS would move the coal, coke, or other bulk good from the dump pits to ships for export. *Id*. at 218:7–11; Long Decl., Ex. 39 [Bridges Tr.] at 63:11-17, 74:11-75:7, 93:10-96:10. The Ordinance stops TLS—not UP, BNSF, or OGRE—from conveying the coal from TLS's dump pits to storage, from blending coal, and then conveying it to ships for export.

If every law that resulted in a rail carrier not carrying a product to or from a facility constituted "regulation of rail transportation" under 49 U.S.C. § 10501(b), ICCTA would have no bounds. The City of Benicia's denial of Valero's application to transport crude oil by rail, Portsmouth's challenge to Sea-3's application to expand its propane facility, American Canyon's refusal to grant a use permit to a pumice and cement transloading facility, and West Palm Beach's application of its zoning and occupational licensing requirements to an aggregate distributor would all have been preempted. *Valero,* 2016 WL 5904757; *Sea-3*, 2015 WL 1215490; *CFNR Operating Co.*, 282 F.Supp.2d 1114; *Fla. E. Coast. Ry. Co.*, 266 F.3d 1324. Like the Ordinance, those laws were not preempted because they did not regulate rail transportation.

4. If the Court Determines that ICCTA Preempts Part of the Ordinance, the Preempted Part Should Be Severed and the Remainder Upheld.

As OBOT concedes, with the sole exception of unloading coal into TLS's dump pits, the Ordinance, on its face, does not regulate any aspect of last mile operations.[25] Reply at 16-17. If this Court were to determine that the Ordinance must, as a matter of law, be read to prohibit a rail carrier from unloading coal into the Terminal dump pits, the Court should sever and uphold the Ordinance by striking the words "unload" from section 8.60.030(12) and "unloading" from

[25] OBOT also lacks standing to argue that ICCTA preempts the Ordinance's regulation of "unloading" into TLS's dump pits. OBOT's alleged injury would be the same whether or not a rail carrier could unload coal or coke into TLS's dump pits because the Ordinance prohibits the Terminal owner or operator from handling and storing coal. *Valley Forge Christian Coll. v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (no standing where injury not sustained "as a consequence of the alleged constitutional error").

section 8.60.040(B)(4).

The Ordinance has a broad severability clause. Myre Decl. Ex. 1, at 13, Section 5.

Severability is a question of state law. *Cal. Tow Truck Ass'n v. City & Cty. of San Francisco*, 807 F.3d 1008, 1030 (9th Cir. 2015). The Ordinance meets the criteria for severability if the "invalid provision [is] [] grammatically, functionally, and volitionally separable." *Calfarm Ins. Co. v. Deukmejian,* 48 Cal.3d 805, 821 (1989).[26]

The Ordinance easily satisfies these tests. The Ordinance is grammatically severable because the words "unload" and "unloading" can be grammatically excised. *City of Dublin v. Cty. of Alameda*, 14 Cal.App.4th 264, 274-75 (1993). It is functionally severable because it remains complete in itself even after the proposed deletions. Finally, it is volitionally severable because the Ordinance substantially accomplishes its purpose (described in § 8.60.010) without the words "unload" and "unloading," *Am. Bankers Ass'n v. Lockyer*, 541 F.3d 1214, 1217 (9th Cir. 2008), and its broad severability clause "establishes a presumption in favor of severance." *Cal. Tow Truck*, 807 F.3d at 1030.

C. HMTA Does Not Preempt Application of the Ordinance to OBOT.

The Court should grant the City's motion for summary judgment because it is undisputed that neither coal nor coke is a federally-designated "hazardous material" (OBOT Br. at 28-29), and the Hazardous Materials Transportation Act ("HMTA"), by its own terms, only preempts state or local requirements that are "not substantively the same" as the Act or existing HMTA regulations. 49 U.S.C. § 5125(b)(1)(A); *see also* City Br. at 33-35.

The Department of Transportation ("DOT"), which administers the HMTA, declared in the *Federal Register* that its regulations "do not … preempt non-Federal requirements imposed on … materials that are not hazardous materials as defined in the [regulations]." 74 Fed. Reg. 46644, 46653 (Sept. 10, 2009). According to DOT, HMTA preemption is implicated when a

[26] A provision is grammatically or mechanically severable "where the valid and invalid parts can be separated by …. phrase, or even single words." *Santa Barbara Sch. Dist. v. Superior Court*, 13 Cal.3d 315, 330 (1975). A provision is functionally severable where the remainder of the enactment "is complete in itself." *People's Advocate, Inc. v. Superior Court*, 181 Cal.App.3d 316, 332 (1986). A provision is volitionally severable if "the remainder ... would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute." *Id.*

local law "purports to broaden the category of hazardous materials to include materials that are not regulated under the [HMTA regulations] *and, thereby, create[s] 'a system of classifying hazardous materials which is totally at variance with the system of hazard class definitions' in the [HMTA regulations]*." *Id*. (emphasis added). OBOT quotes the first half of this sentence but omits the rest, Reply at 21, which is fatal to its argument. OBOT also ignores DOT's ultimate finding in the same notice—namely, that Maryland regulations classifying and regulating electronic waste as "a State 'hazardous waste'" were *not* preempted because they did not apply to federally-designated "hazardous materials." 74 Fed. Reg. at 46644, 46653. Here, no federally-designated hazardous materials are at issue. Moreover, the Ordinance merely limits the storage and handling of coal and coke at bulk material facilities; it does not designate or classify coal or coke as hazardous—let alone create a whole new "system" of classifying hazardous material, which is the threshold for preemption. *Id*. at 46653.

OBOT also cites *Chlorine Institute, Inc. v. California Highway Patrol*, Reply at 22, but again misconstrues the authority. In *Chlorine Institute*, the Court noted HMTA preemption arises for state requirements "pertaining to an area *already* regulated under [the HMTA]," and faulted California for "creat[ing] a separate regulatory regime" for substances like chlorine and oleum that were federally designated as hazardous and therefore subject to "extensive regulation." 29 F.3d 495, 497-98 (9th Cir. 1994) (emphasis added). Again, since it is undisputed that coal and coke are *not* regulated as federally-designated hazardous materials, *Chlorine Institute* compels a grant of summary judgment for the City. *Id.*; *accord Waering v. BASF Corp.*, 146 F.Supp.2d 675, 681 (M.D. Pa. 2001) (stating preemption arises when "differing state laws" apply to a substance that "*has* been placed on the [HMTA hazardous materials list]) (emphasis in original).[27]

D. The Shipping Act Does Not Preempt Application of the Ordinance to OBOT.

OBOT fails to meet its burden to show preemption under any provision of the Shipping

[27] OBOT's Reply does not quote or even cite the HMTA's preemption provision, 49 U.S.C. § 5125, exposing its claim as baseless. As the City noted previously, OBOT has not asserted (nor could it assert) a preemption claim under section 5125(a). City Br. at 35 n.45. OBOT's Reply fails to address or rebut the City's argument—an apparent concession. As for section 5125(b), OBOT exclusively relied on subsection (b)(1)(B)(A) in its opening brief, and that provision is no bar to the Ordinance as set forth *ante* and in the City's Opening Brief. City Br. at 33-35.

Act. OBOT insists its preemption claim is based solely on 46 U.S.C. § 41106(1). Reply at 22. But OBOT actively misquotes section 41106(1), which provides that a marine terminal operator may not "*agree with another marine terminal operator or with a common carrier* to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp." (emphasis added). Here there is no *agreement between two parties* to unreasonably discriminate, and section 41106(1) does not apply.[28]

Likewise, OBOT has not shown preemption under § 41106(2) or (3).[29] First, OBOT has abandoned its claims under these provisions by relying exclusively on § 41106(1). Reply at 22. Second, OBOT falsely claims that the Ordinance is "based on the City's decision that coal and petcoke are politically unpopular" (Reply at 23), when the Ordinance is in fact based on the health and safety dangers of handling coal and coke, which justify differential treatment under the Shipping Act. The Shipping Act permits marine terminal operators to treat entities differently if the differential treatment is based upon "recognized transportation conditions . . . such as peculiarities in the nature of the transportation needs of the cargo . . . or conditions at a port or other facility that are truly beyond the carrier's control." *N.Y. Shipping Ass'n, Inc. v. Fed. Mar. Comm'n*, 854 F.2d 1338, 1366 (D.C. Cir. 1988).

OBOT has not met its heavy burden to prove the Ordinance is preempted by the Shipping Act, and the Court should grant summary judgment for Defendant on this claim.

III. CONCLUSION

The Court should grant the City's and Defendant-Intervenors' motions for summary judgment and deny OBOT's. The undisputed facts establish that the City has not breached the

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[28] Further, OBOT itself is not a marine terminal operator for the purposes of the Shipping Act, and OBOT has offered nothing beyond a single conclusory allegation that "[t]he operator of the Terminal will be a marine terminal operator." First Amended Complaint (Dkt. 74), ¶ 154. In essence, OBOT is endeavoring to bring this preemption claim based on potential future injury to a yet-to-be-determined third party. OBOT lacks standing to bring such a claim. *See Warth*, 422 U.S. at 499 (a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties").

[29] These subsections prohibit certain acts by an marine terminal operator ("MTO"). Section 41106(2) prohibits MTOs from giving "unreasonable preference" or imposing "unreasonable prejudice" on any person, while section 41106(3) prohibits MTOs from "unreasonably refus[ing] to deal or negotiate."

DA, that the application of the Ordinance to OBOT and the Terminal is neither preempted nor in violation of the Commerce Clause.

Dated: December 29, 2017

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